CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 179

UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER,

vs.

JOHN F. GUENTHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 19, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,310)

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[fol. 3]

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

JOHN F. GUENTHER, 3238 Lorain Avenue, Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Insurance Center Bldg., Defendant

PETITION FOR MONEY ONLY—Filed May 6, 1927

Now comes the plaintiff and for his cause of action herein says that the defendant is a corporation duly organized according to law and authorized to do business in the State of Ohio; that it is entitled in the general insurance business; that on or about the 15th day of February 1925, for and in consideration of the sum of Two Hundred Twenty-one Dollars ($221.00), the said defendant issued to this plaintiff its automobile insurance policy number A L 469,438 (a copy of which policy is in possession of the said defendant) by the terms of which it insured this plaintiff against loss and/or expense arising or resulting from claims upon the assured for damages in consequence of any accident occurring within the limits of United States and Canada during the term of said policy, by reason of the ownership, maintenance or use, (including the carrying of goods thereon and the loading and unloading thereof when commercially used) of the automobile or any of the automobiles enumerated and described in said policy resulting in "Bodily injuries or death resulting at any time therefrom, suffered by any person or persons, excepting (a) the Assured's employe or employes while engaged in operating or caring for any [fol. 4] of the Assured's automobiles, (b) any other employe of the Assured who is injured when engaged at the time of such injury in performing any duty for the Assured in connection with the trade, business or occupation of the Assured." The defendant by the terms of said policy limited its liability to the sum of Ten Thousand Dollars

($10,000.00) for loss arising out of one accident to one individual.

Said policy further provided that the said defendant would defend in the name and on behalf of this plaintiff any suit brought against this plaintiff to enforce any claim, whether groundless or not, on account of damages suffered or alleged to be suffered under the circumstances hereinbefore described and would pay the expenses incurred in defending any suit, also the interest on any judgment within the limits of the insurance granted by said policy and any costs taxed against the assured on account thereof.

This plaintiff further says that on or about the 14th day of May 1925, about 4:30 o'clock P. M., while said above described policy of insurance was in full force and effect, one of the automobile trucks described in said policy owned by this plaintiff and engaged in this plaintiff's business, came into collision with one Fred H. Kroeger, 1520 Lakewood Avenue, Lakewood, Cuyahoga County, Ohio; that in said collision said Fred H. Kroeger received bodily injuries and thereafter and on or about the 4th day of November 1925 the said Fred H. Kroeger instituted in the Court of Common Pleas of Cuyahoga County an action against this plaintiff to recover damages in the sum of Fifty Thousand Dollars ($50,000.00) because of said accident and resultant injury, said action being number 250,486 on the docket of said Court; that this plaintiff fully complied with all of the terms and conditions of said policy of insurance, notified the defendant of the happening of said accident and of the filing of said suit and forwarded to said defendant the copy of the summons and petition served upon him in said action; that thereafter the said defendant, without just cause, notified this plaintiff that it would not settle said claim nor pay any judgment that might be rendered against this plaintiff by reason of said accident and that it would not in any manner defend said suit, all of which was in violation of its said policy of insurance; that thereupon this plaintiff was obliged to and did employ counsel to defend said action and did defend said action at his own [fol. 5] expense; that on or about the 25th day of January, 1927, after a full and complete trial of said cause, a jury in said Court returned a verdict in favor of said Fred H. Kroeger and against this plaintiff in the sum of Two Thousand Dollars ($2,000.00); that thereafter said Fred H.

Kroeger filed a motion for a new trial in said Court; that on or about the 24th day of March 1927 the Court of Common Pleas of Cuyahoga County made the following entry in said action:

"The Court orders that unless the defendant consents to an increase in the amount of the verdict that the verdict would be set aside because the same is against the weight of evidence in that it is insufficient to compensate plaintiff for his injuries and that the same be increased $750.00, making the amount $2,750.00. Thereupon the motion for a new trial is overruled and judgment is rendered against the defendant for $2,750.00 and costs of this suit to which defendant excepts."

That thereafter and on or about the 2nd day of April 1927 this plaintiff paid said judgment in the sum of Twenty-seven Hundred and Fifty Dollars ($2,750.00); that this plaintiff was further obliged and did pay the court costs in said action amounting to Fifteen Dollars and Sixty-two Cents ($15.62).

Plaintiff further says in connection with the defense of said suit he incurred counsel fees in the sum of Eleven Hundred and Twenty-five Dollars ($1,125.00); that by the terms of said policy said defendant had obligated itself to defend said suit at its own expense and pay said judgment and costs and by reason of its violation of its said contract of insurance this plaintiff was damaged in the sum of Three Thousand Eight Hundred Ninety Dollars and Sixty-two Cents ($3,890.62).

Wherefore plaintiff prays judgment against the said defendant in the sum of Three Thousand Eight Hundred Ninety Dollars and Sixty-two Cents ($3,890.62) with interest thereon from the 2nd day of April, 1927, his damages as aforesaid sustained, together with the costs of this action.

Quigley & Byrnes, Attorneys for Plaintiff.

[fol. 6] *Duly sworn to by John F. Guenther. Jurat omitted in printing.*

[fol. 7] In Court of Common Pleas of Cuyahoga County

[Title omitted]

Precipe for Summons—Filed May 6, 1927

To the Clerk:

Issue summons in the above entitled action for service upon the defendant returnable according to law. Endorse same "Action for money only; amount claimed $3,890.62 with interest thereon from the 2nd day of April, 1927 together with costs."

Quigley & Byrnes, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 8] In Court of Common Pleas of Cuyahoga County

Summons and Sheriff's Return—Filed May 11, 1927

The State of Ohio,
Cuyahoga County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify United States Fidelity & Guaranty Company, a corporation, that it has been sued by John F. Guenther in the Court of Common Pleas of Cuyahoga County, and that unless it answer by the 4th day of June, A. D. 1927, the petition of the said plaintiff against it filed in the Clerk's office of said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 16th day of May, A. D. 1927.

Witness, George Wallace, Clerk of said Court and the seal thereof at the City of Cleveland, this 6th day of May, A. D. 1927.

George Wallace, Clerk, by H. L. Nicholas, Deputy Clerk. (Seal.)

THE STATE OF OHIO,
Cuyahoga County, ss:

On the 9th day of May 1927 I served this writ on the within named U. S. Fidelity & Guaranty Company by delivering a true and certified copy thereof with all the endorsements thereon to Terwelliger, Sec'y of said Company, the President or other chief officers of said Company, not found in my County.

E. J. Hanratty, Sheriff, by S. E. Hart, Deputy.

[File endorsement omitted.]

[fol. 9] IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

[Title omitted]

PETITION FOR REMOVAL—Filed June 4, 1927

Now comes United States Fidelity and Guaranty Company and respectfully represents to the Court that it is named as defendant in the above entitled cause, which is of a civil nature, and the matter and amount in dispute in said cause exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that the plaintiff at the time of the commencement of this action was and now is a citizen of the State of Ohio, residing in the City of Cleveland, Ohio, which said city and state are situated within the jurisdiction and limits of the United States District Court, Northern District of Ohio, Eastern Division.

Your petitioner was, at all times mentioned in the plaintiff's petition, and still is a resident of the State of Maryland, and your petitioner desires to remove this cause, before the trial thereof, to the District Court of the United States, for the Northern District of Ohio, Eastern Division.

Your petitioner files herewith a good and sufficient bond under the statutes in such cases made and provided, conditioned as the law directs, and that it will, within thirty (30) days of the filing of the petition for removal, file a certified copy of the record of this cause in the District

Court of the United States, for the Northern District of Ohio, Eastern Division, for the payment of all costs which may be awarded by said court, if said District Court shall determine that this suit was improperly and wrongfully removed thereto.

[fol. 10] Your petitioner further prays that this court will proceed no further herein, except to order the removal, approve the bond herewith presented, and to direct a transcript of the record to be made and certified as provided by law.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

Duly sworn to by Peter Reed. Jurat omitted in printing.

[File endorsement omitted.]

[fols. 11 & 12] Bond on renewal for $500.00, approved and filed June 4, 1927, omitted in printing.

[fol. 13] In Court of Common Pleas of Cuyahoga County

[Title omitted]

Notice of Filing Petition and Bond for Removal—Filed June 4, 1927

To Quigley & Byrnes, attorneys for plaintiff, Cleveland, Ohio:

You are Hereby Notified that on the 4th day of June 1927, at the hour of 9:00 o'clock A. M., or as soon thereafter as suits the convenience of the court, the defendant in the above entitled cause, United States Fidelity & Guaranty Company, will file in the Common Pleas Court of Cuyahoga County, in the State of Ohio, in which court said suit is now pending, its petition and bond for removal, of said cause from said court to the District Court of the

United States, in and for the Northern District of Ohio, Eastern Division.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

Receipt of the foregoing notice is hereby acknowledged by a copy left this 4th day of June 1927.

Quigley & Byrnes, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 14] In Court of Common Pleas of Cuyahoga County

Order for Removal—June 4, 1927

The above entitled cause came on to be heard before me this 4th day of June 1927, on petition of the United States Fidelity & Guaranty Company for removal of said cause to the United States District Court, for the Northern District of Ohio, Eastern Division, and it appearing from the facts set forth in said petition that the cause is removable to said court, and that the proper bond has been filed.

It is Hereby Ordered, Adjudged and Decreed, that said petition be granted, said bond be accepted and approved, and that a transcript of the record of this court be made and certified as provided by law, and that this court proceed no further herein.

Plaintiff's costs in this action are taxed at $4.66.

Defendant's costs in this action are taxed at $7.40.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 15] Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 21, 1927

Now comes United States Fidelity & Guaranty Company, defendant herein, and files this its answer to the petition heretofore filed herein.

Defendant admits that on or about the 15th day of February 1925 it issued and delivered to plaintiff its automobile liability insurance policy No. AL 469438, which, subject to certain conditions, contained substantially the provisions set forth in plaintiff's petition.

[fol. 16] Defendant further admits that on or about the 14th day of May 1925 while said automobile was being operated by one Theodore Winter, it collided with one Fred H. Kroeger at or near the intersection of Detroit Avenue and Lakewood Avenue in the city of Lakewood, Ohio, and that in said collision the said Fred H. Kroeger received certain injuries on account of which he thereafter recovered a judgment in the Common Pleas Court of Cuyahoga County, Ohio, against the plaintiff herein in the sum of $2,750 and costs.

Further answering defendant denies all of the other allegations in said petition contained.

First Defense

For its first defense defendant says that on or about the 15th day of February 1925 it issued and delivered to the plaintiff herein its automobile liability insurance policy No. AL 469438, wherein and whereby, and subject to the terms, limits and conditions set forth therein, it insured the plaintiff against loss or expense arising or resulting from claims upon him for damages in consequence of accidents occurring by reason of the ownership, maintenance or use of the automobiles described in said policy, resulting in bodily injuries suffered by any person or persons, excepting assured's employees.

Defendant further says that said policy was expressly made subject to certain conditions, one of which was that it should not cover any liability of the assured while any of the insured automobiles was being operated by any person under the age limit fixed by law.

Defendant further says that prior to the 14th day of May 1925, to-wit, on or about the 22nd day of September 1924 the Council of the City of Lakewood, Ohio, duly enacted a certain ordinance which was thereafter duly approved, and which on said 14th day of May 1925 was in full force and effect, said section being as follows:

"It shall be unlawful for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of 18 years to operate or run said motor vehicle upon public highways, streets or alleys in said City of Lakewood."

Defendant further says that notwithstanding the provisions of said ordinance and in entire and complete dis- [fol. 17] regard of the same, the plaintiff herein, being the owner of one of the automobiles described in said policy, did on the 14th day of May 1925 permit his employee Theodore Winter, a minor under the age of 18 years, to operate and run said motor vehicle upon the public highways and streets of said City of Lakewood, and that said automobile was being operated by the said Theodore Winter with the plaintiff's consent and permission at the time of the accident to the said Fred H. Kroeger.

Defendant therefore denies that said policy of insurance covered the liability of the assured set forth in the petition herein, and by reason of the premises prays that it may go hence with its costs.

United States Fidelity & Guaranty Company, by Dustin, McKeehan, Merrick, Arter & Stewart, Its Attorneys.

Duly sworn to by Pierce D. Metzger. Jurat omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

REPLY—Filed Sept. 30, 1927

Now comes the plaintiff and for his reply to the answer of defendant says that he admits that on the 14th day of November 1925 there was in full force and effect in the

City of Lakewood, Ohio, an ordinance, a copy of which is correctly set forth in said answer but this plaintiff avers that the policy of insurance issued by said defendant to this plaintiff contained the following:

"This policy is subject to the following conditions:
(A) The policy shall not cover any liability of the assured while being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event."

that the said ordinance does not prescribe the age limit of an operator of an automobile and that the operator of plaintiff's automobile at the time of the accident to said Fred Kroeger was not violating any ordinance of the City of Lakewood. This plaintiff further says that the operator of this plaintiff's automobile was in fact over the age of sixteen and that the Legislature of the State of Ohio has never enacted any law fixing the age limit of the operators of automobiles and therefore plaintiff's automobile, at the time of the accident referred to in plaintiff's petition occurred, was not being operated by any person under the age limit fixed by law, and except as herein admitted this plaintiff denies each and every allegation in said answer contained.

Wherefore this plaintiff prays for the judgment asked for in his petition.

Quigley & Byrnes, Attorneys for Plaintiff.

Duly sworn to by John F. Guenther. Jurat omitted in printing.

[fol. 19] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed Oct. 6, 1927

Now comes the United States Fidelity & Guaranty Company, defendant herein, and moves that judgment be entered for the defendant upon the pleadings filed in the above entitled case.

United States Fidelity & Guaranty Company, by Dustin, McKeehan, Merrick, Arter & Stewart, Its Attorneys.

Notice of the filing of the foregoing motion and brief in support thereof is hereby acknowledged this 5th day of October 1927.

Quigley & Byrnes, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION THAT PLAINTIFF MAY AMEND REPLY BY INTERLINEATION—Filed Oct. 13, 1927

To the Clerk:

We, the Attorneys for the respective parties, do hereby stipulate that the words "but under eighteen years of age" may be inserted by interlineation by the plaintiff in his reply after the words "was in fact over the age of sixteen."

Quigley & Byrnes, Attorneys for Plaintiff. Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

It is so ordered. D. C. Westenhaver, U. S. District Judge.

[fol. 20] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed Nov. 17, 1927

WESTENHAVER, District Judge:

This cause is before me on defendant's motion for a judgment in its favor on the pleadings. These pleadings consist of a petition, answer, and reply. The following are the material facts admitted by the pleadings: defendant issued and delivered to plaintiff an automobile liability insurance policy No. AL 469,483, bearing date February 15, 1925. By its terms, this policy indemnified plaintiff against loss or expense arising or resulting from claims upon him for damages in consequence of accidents occurring by reason of the ownership, maintenance, or use of the said automobile, resulting in bodily injuries suffered by any person or persons other than the insured's employees. On May 14, 1925, while said policy was in force, the automobile was involved in a collision, inflicting injuries on one Fred H. Kroeger. Suit was brought by him against plaintiff in the Common

Pleas Court of Cuyahoga County, Ohio. He recovered a judgment for $2,750 and costs. Defendant repudiated liability for said accident and refused to defend said action, as was required by the terms of its policy. This suit is brought on said policy to recover the amount paid by plaintiff in settlement of said judgment and costs and expenses and attorneys' fees in defending in said action.

At the time said accident occurred, the automobile was being operated by one Theodore Winter, with the knowledge and consent of the insured. He was a minor, over the age of 16 and under the age of 18 years. The policy contained a condition in the following language: "The policy shall not cover any liability of the assured while being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event." The insured lived, and the policy was written and delivered in the city of Cleveland. The accident occurred in the city of Lakewood. In Lakewood an ordinance was then in existence and in force, reading as follows: "It shall be unlawful for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of eighteen years to operate or run said motor vehicle upon the public highways, streets or alleys in the said city of Lakewood." The city of Lakewood has no ordinance making it unlawful for any minor over sixteen years of age to operate a motor vehicle. The [fol. 21] State of Ohio has enacted no law making it unlawful for a minor over the age of sixteen years to operate a motor vehicle. The question then is whether the ordinance of Lakewood, where the accident occurred, is a law fixing an age limit, within the meaning of the condition above quoted, of the insurance policy.

In my opinion, a municipal ordinance is not a law within the proper interpretation and construction of said condition of the policy. No principle of law is better settled than that covenants and conditions in an insurance policy, exempting an insurer from liability, are to be strictly construed against the insurer. If the language of a covenant or condition exempting the insurer from liability is susceptible of two constructions or meanings, that will be adopted which is most favorable to the insured. The expression "by law" is at least susceptible of two constructions. It may mean or be fully satisfied by limiting it to a law enacted by the Legislature of a State. Ordinarily,

when one speaks of the "law," this is what is meant. One thus speaking, has in mind a rule of conduct of uniform and general application prescribed by the supreme law-making body of some sovereignty. Ordinarily, when one speaks of a law, one does not have in mind ordinances, by-laws, or regulations of a municipality. The courts take judicial cognizance of statutes or laws of the State. All other persons are conclusively presumed to have knowledge of such laws. The courts do not take judicial cognizance of ordinances, by-laws, or regulations of a municipality. If and whenever one is invoked, it becomes necessary to plead it and prove it. In my opinion, applying the rule of strict construction to the provisions in question, exempting the insurer from liability, it is clear that what the contracting parties must be held to have had in mind was the statute law of a State and not a municipal ordinance, by-law, or regulation, of which courts do not take judicial cognizance.

The insurer, had it been intended to include municipal ordinances, could very easily have said so. In Cuyahoga County there are more than fifty municipalities having equal right to enact ordinances of the same nature as the one in question. It cannot be held that the contract contemplates that every insured should investigate and learn whether an ordinance fixing an age limit was in force in all these municipalities before entrusting his automobile to some one else. The insurer might have written this policy that way. If it had done so, it probably could not have [fol. 22] written any insurance, since it is highly improbable that any automobile owner would knowingly accept a policy subjecting him to a burden so impossible of performance. It is not permitted to an insurer to lay traps and set snares to catch unwary automobile owners.

The motion for judgment on the pleadings will be denied. An exception will be noted.

D. C. Westenhaver, Judge.

November 17, 1927.

IN UNITED STATES DISTRICT COURT

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS—Nov. 17, 1927

This day this cause came on to be heard on the motion of defendant for a judgment in its favor on the pleadings and

was submitted to the Court, on consideration thereof, the Court denies said motion, to which ruling of the Court defendant, by its attorneys, excepts.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE AMENDED REPLY—Dec. 30, 1927

On application of plaintiff, leave is hereby granted him to file his amended reply herein, and said amended reply is accordingly filed.

[fol. 23] IN UNITED STATES DISTRICT COURT

AMENDED REPLY—Filed Dec. 30, 1927

Now comes the plaintiff and for his reply to the answer of defendant says that he admits that on the 14th day of November 1925 there was in full force and effect in the City of Lakewood, Ohio, an ordinance, a copy of which is correctly set forth in said answer but this plaintiff avers that the policy of insurance issued by said defendant to this plaintiff contained the following:

"This policy is subject to the following conditions:
(A) The policy shall not cover any liability of the assured while being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event."

that the said ordinance does not prescribe the age limit of an operator of an automobile. This plaintiff further says that the operator of this plaintiff's automobile was in fact seventeen years of age, and that the Legislature of the State of Ohio has never enacted any law fixing the age limit of the operators of automobiles, and except the allegations of said answer admitting the allegations of plaintiff's petition and as herein admitted this plaintiff denies each and every allegation in said answer contained.

Wherefore this plaintiff prays for the judgment asked for in his petition.

Quigley & Byrnes, Attorneys for Plaintiff.

Duly sworn to by William M. Byrnes. Jurat omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed Dec. 30, 1927

Now comes the plaintiff and respectfully moves the Court for a judgment on the pleadings and the stipulation heretofore filed in the above entitled action.

Quigley & Byrnes, Attorneys for Plaintiff.

Notice

Counsel for the defendant will take notice that the plaintiff has filed his motion for a judgment in his favor upon the pleadings and the stipulation heretofore filed in the above entitled action, and that said motion will be on for hearing in said Court as soon as the same can be called to the attention of one of the judges thereof, in accordance with the rules of said Court.

Quigley & Byrnes, Attorneys for Plaintiff.

Receipt of a copy of the above motion and notice is hereby acknowledged this 30th day of December 1927.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION IN RE EXPENSE OF COUNSEL FEES—Filed Dec. 30, 1927

It is hereby stipulated and agreed by and between the parties hereto that the expense of the counsel fees described in the petition herein for $750.00 instead of $1,125 as alleged therein, and that in the event that judgment is entered

herein in favor of the plaintiff, the sum of $750, and no more, be allowed by the court as counsel fes for such services.

Quigley & Byrnes, Attorneys for Plaintiff. Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PLAINTIFF'S MOTION FOR JUDGMENT UPON THE PLEADINGS AND THE STIPULATION FILED; JUDGMENT FOR PLAINTIFF—Dec. 30, 1927

This cause came on to be heard upon the motion of the plaintiff for a judgment in his favor upon the pleadings and the stipulation filed herein, and the Court being fully advised in the premises, finds that said motion should be and the same is hereby granted.

It is, therefore, ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of Three Thousand Six Hundred Fifty-five Dollars and Sixty-two Cents ($3,655.62), for which amount, together with costs in the sum of $—, judgment is hereby rendered against the said defendant, to which judgment and ruling of the Court defendant excepts.

[fol. 26] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed Jan. 9, 1928

Now comes United States Fidelity and Guaranty Company, defendant herein, and says that on the 30th day of December, 1927, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully and in detail appear by the assignment of errors filed with this petition.

Wherefore defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of

errors so complained of, and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the said Circuit Court of Appeals.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

Duly sworn to by George P. Bickford. Jurat omitted in printing.

[fol. 27] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Jan. 9, 1928

Now comes the defendant in the above entitled cause, and in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred on the trial of this action and in the entering of judgment herein, and upon which it will rely in the prosecution of its writ of error to reverse the judgment of this honorable court:

(1) That the court erred in overruling defendant's motion for judgment on the pleadings.

(2) That the court erred in sustaining plaintiff's motion for judgment on the pleadings and entering judgment for plaintiff pursuant thereto.

Wherefore defendant prays that the said judgment of the District Court of the United States, Northern District of Ohio, Eastern Division, in favor of the plaintiff be reversed and remanded for further proceedings.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF ERROR—Jan. 9, 1928

The defendant having this day come by its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error intended to be urged

by it, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, and [fols. 28-30] that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $500.00, subject to the approval of the Court, but if supersedeas desired, bond in penalty of $5,000.00 is required.

Bond on writ of error for $500.00, approved and filed January 12, 1928, omitted in printing.

[fol. 31] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed Jan. 12, 1928

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between John F. Guenther as plaintiff and United States Fidelity and Guaranty Company as defendant, a manifest error hath happened, to the great damage of the said United States Fidelity and Guaranty Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* 11th day of February, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 12th day of January, in the year of our Lord one thousand nine hundred and twenty-eight, and of the Independence of the United States of America the one hundred and fifty-second.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, by F. J. Denzler, Deputy Clerk. (Seal.)

[fol. 32] Allowed by D. C. Westenhaver, Judge of the District Court.

Return on writ of error omitted in printing.

[fols. 33 & 34] Citation, in usual form, showing service on Quigley & Byrnes, omitted in printing.

[fol. 35] IN UNITED STATES DISTRICT COURT

PRECIPE FOR TRANSCRIPT—Filed Jan. 11, 1928

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

Record from Cuyahoga County Common Pleas Court.

Answer.

Reply.

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* Not exceeding 30 days from the day of signing the citation.

Motion by defendant for judgment on pleadings.
Stipulation filed October 13, 1927.
Order overruling defendant's motion for judgment on pleadings.
Opinion of court on motion.
Leave to plaintiff to file amended reply.
Amended reply.
Motion by plaintiff for judgment on pleadings.
Stipulation of parties filed December 30, 1927.
Order granting plaintiff's motion for judgment on pleadings and entering judgment for plaintiff.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Bond.
Writ of error.
Return of Clerk to writ of error.
Citation.
Stipulation re certification of record.
Precipe for transcript.
Certificate of Clerk.
And deliver all papers to The Gates Legal Publishing Company for printing.

Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

Service of the foregoing Precipe for Transcript is acknowledged this 11th day of January, 1928.

Quigley & Byrnes, Attorneys for Plaintiff. W. A. Kane.

[fol. 36] IN UNITED STATES DISTRICT COURT

STIPULATION RE CERTIFICATION OF RECORD—Filed Jan. 11, 1928

In accordance with Section 7 of Rule 44 of the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause,

as set forth in the precipe for transcript, without further comparison by the clerk.

Quigley & Byrnes, Attorneys for Plaintiff. Dustin, McKeehan, Merrick, Arter & Stewart, Attorneys for Defendant.

[fols. 37 & 38] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 39] Appearance of counsel omitted in printing.

Minute entry of argument and submission omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Filed April 3, 1929

Error to the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed April 3, 1929

Before Hicks, Hickenlooper, and Knappen, Circuit Judges

HICKENLOOPER, Circuit Judge:

John F. Guenther, plaintiff below, recovered judgment against the United States Fidelity & Guaranty Co. upon a

policy of automobile insurance indemnifying him against loss and/or expense arising in consequence of any accident occur-ing within the limits of the United States and Canada by reason of the use of the automobile covered. Plaintiff was a resident of the city of Cleveland, Ohio. The accident occurred in the adjoining municipality of Lakewood while the automobile was being operated by an employee of the plaintiff who was more than sixteen years of age but less than eighteen. At the time of the accident an ordinance was in force in the city of Lakewood making it unlawful "for any owner, bailee, lessee or custodian of any motor vehicle to permit a minor under the age of eighteen years to operate or run said motor vehicle upon public highways, streets or alleys in said city of Lakewood." The policy specifically provided: "This policy is subject to the following conditions: (A) The policy shall not cover any liability of the insured while being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event." It is here claimed that by reason of this provision of the policy and the existence of the ordinance no recovery can be had upon the policy.

Passing the contention that the ordinance does not "fix an age limit" for the operation of an automobile, per se, the sole remaining question for determination is one of construction, whether this phrase of the policy was intended to preclude liability where the age limit is fixed by municipal ordinance and no limit is fixed by state statute. Manifestly the provision is "to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular [fol. 41] sense." Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 463. But if the policy "is so drawn as to require interpretation, and to be fairly susceptible to two different constructions, the one will be adopted that is most favorable to the insured." Thompson v. Phenix Ins. Co., 136 U. S. 287, 297, citing National Bank v. Ins. Co., 95 U. S. 673, 678. See, also, Liverpool, etc., Ins. Co. v. Kearney, 180 U. S. 132, 136; Schambs v. Fidelity & Casualty Co., 259 Fed. 55 (C. C. A. 6); and O'Brien v. North River Ins. Co., 212 Fed. 102, 105 (C. C. A. 4). Resort cannot be had to this latter rule to nullify the plain and obvious provisions of an insurance policy. (Cf. Interstate Business Men's Ac-

cident Ass'n v. Lewis, 257 Fed. 241, 244 [C. C. A. 8]; Canton Ins. Office v. Independent Transp. Co., 217 Fed. 213 [C. C. A. 9]), but the question remains whether the language used is in fact susceptible to a double meaning or, otherwise expressed, whether it will fairly and reasonably support that construction upon which liability of the insurer may be sustained.

Judge Westenhaver, in his opinion in the court below, decided this question in the following language: "The expression 'by law' is at least susceptible of two constructions. It may mean or be fully satisfied by limiting it to a law enacted by the Legislature of a state. Ordinarily, when one speaks of the 'law,' this is what is meant. One thus speaking, has in mind a rule of conduct of uniform and general application prescribed by the supreme law-making body of some sovereignty. Ordinarily, when one speaks of a law, one does not have in mind ordinances, by-laws, or regulations of a municipality. * * * The insurer, had it been intended to include municipal ordinances, could very easily have said so. In Cuyahoga County there are more than fifty municipalities having equal right to enact ordinances of the same nature as the one in question. It cannot be held that the contract contemplates that every insured should investigate and learn whether an ordinance fixing an age limit was in force in all these municipalities before entrusting his automobile to someone else." In this interpretation of the language used in the policy we concur.

It is earnestly contended that the Supreme Court of the United States, and this court, have repeatedly held that [fol. 42] the ordinances of a municipality, passed in the exercise of a power delegated to it by the state, are to be considered as laws of the state within the meaning of the constitutional provision that no state shall pass any law impairing the obligation of contracts, citing Iron Mountain R. Co. v. Memphis, 96 Fed. 113 (C. C. A. 6); Cumberland Tel. & Tel. Co. v. Memphis, 198 Fed. 955 (Three-judge case, Tenn.); New Orleans W. W. Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18. This doctrine is of but little assistance in the solution of our question for such question is not whether the language used would also reasonably support the inclusion of municipal ordinances fixing an age limit, but rather whether such language could not, as reasonably, be considered as relieving the company of liability only in cases

of violation of state legislation. For instances, where similar language was so limited to state enactment, see Fullwood v. Canton, 116 O. S. 732; Rosenberg v. Selma, 168 Ala. 195; Taylor v. Philadelphia, 261 Pa. 458; Wright v. Macon, 5 Ga. App. 750, 763; Royal Indemnity Co. v. Schwartz, 172 S. W. 581 (Tex. Civ. App. 1915) (semble contra).

The fact that the territory covered by the policy is specifically stated as within the limits of the United States and Canada, the myriad of separate municipalities within these territorial limits, the fact that the accident occurred in a municipality other than that of the residence of the plaintiff, the manifest double meaning of the words "by law," the use of these words in both senses in general parlance and judicial opinion, the fact that the state and not the municipality is the natural governmental unit under consideration by the parties when writing insurance, the fact that had it been intended to include municipal ordinances this could have been so easily stated, and the application of the rule of construction to be applied under such circumstances, constrain us to the opinion that liability is not avoided by the fact that the operator of the automobile was less than eighteen years of age. He was more than sixteen years of age and the policy fixes this age limit in the absence of other age limit "fixed by law." To hold as we here do, does not make inoperative any term or provision of [fol. 43] the policy but does construe the policy provisions in use in all the states as applying the age limit fixed by state-wide legislation, if any and if not less than sixteen years, but in the absence of state-wide legislation, as in Ohio, or if such legislation fixes a limit less than sixteen, then as providing that sixteen years shall be considered the applicable age limitation.

The judgment of the court below is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

KNAPPEN, Circuit Judge (dissenting):

I am unable to concur in the opinion of the majority. The policy expressly provides that it should not "cover any liability of the assured while the automobile is being operated by any person under the age limit fixed by law, or

under the age of sixteen years in any event." The municipal ordinance made it unlawful for any owner of a motor vehicle to permit "a minor under the age of eighteen years to operate or run said motor vehicle upon public highways, streets or alleys, in the city of Lakewood." I think that under the situation existing here the age limit was "fixed by law." Not only was there no state law otherwise governing the subject, but the legislature had expressly conferred upon municipalities "special power to regulate the use of the streets * * *," and had given the council "the care, supervision and control, of public highways, streets, avenues, alleys * * * within the corporation." Gen. Code Ohio, Sec. 3714. The ordinance in question is directly within the statutory authority. The assured was the owner of the automobile. As applied to this case, both the ordinance and the policy provision are aimed at the action of the same person. It is thus immaterial that the ordinance does not in terms make unlawful the actual driving on the part of one under eighteen years of age.

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,310. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 179. United States Fidelity & Guaranty Company, petitioner, vs. John F. Guenther. Petition for writ of certiorari and exhibit thereto. Filed June 19, 1929. File No. 34,310.